Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HAWTHORNE, Petitioner

VS.

UNIVERSITY OF WEST FLORIDA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS, ELEVENTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

James E. Hawthorne, Pro-Se
P.O. Box 9556
Pensacola, FL 32513
Tel: wk.(850) 469-0921, Hm. (850) 433-5520

69 pp

QUESTIONS PRESENTED

1. Is the Court in error granting Summary Judgment when a Rule 60 Motion under the Rules of Civil Procedure is filed; when neglect, newly discovered evidence, and fraud come into play after summary judgment was entered?

2. Does the rule, law or statute of ineffective assistance of counsel under the 6th Amendment apply to a paid attorney, as well as one appointed by the courts - both state and federal?

LIST OF PARTIES

In accordance with Rule 14, Rules of the United States Supreme Court, the undersigned Pro-Se Counsel Petitioner certifies that the following parties have an interest in the outcome of this case;

Petitioner	James E. Hawthorne
Respondent(s)	Barbara D. Auger, Esq. Pennington, Culpepper, Moore, Wilkinson, Dunbar and Dunlap Attorneys at Law 2nd Floor 215 South Monroe Street Post Office Box 10095 Tallahassee, Florida 32302-2095
The Honorable	Roger Vinson, United States District Judge Northern District, Pensacola Division
The Honorable	Susan M. Novotny, United States District Judge Magistrate Northern District, Pensacola Division
The Honorable	Tjoflat, Cox and Carnes, United States

	Circuit Judges United States Court of Appeals Eleventh Circuit Court
UWF Personnel	Ms. Rosalind Fisher, Director Office of Human Resources Mr. John Martin, VP Mr. Earl Smith, Director of Phy. Plant Mr. Dan Simpler, Director, Building Services Ms. Rachel Booker, Custodial Supervisor The UWF Staff and Employees as a whole because of the public interest this has created.
Parents of Petitioner:	Mr. and Mrs. N. Hawthorne, 412 E. Strong Street Pensacola, FL 32501

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JURISDICTION

The jurisdiction of this Court is invoked under 18 U.S.C. 1254(i), that the date in which the United States Court of Appeals decided this case was October 31, 1997 (affirmed).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In reviewing a decision for consideration upon the District Court granting summary judgment to the moving party, Respondents. The Appellate Court applies the same legal standard as those which control the District Court in determining whether the judgment is appropriate, American Viking Contractors, Inc. v. Scribner Equipment Co., Inc., 745 F.2d 1365 (11th Cir. 1984). You evaluate whether the moving party has met its burden of showing that there is no genuine issue of material facts, and that the moving party is entitled to a judgment as a matter of law F.R.C.P. 56 Celotex Corp. v. Catrett, 477 U.S. 317, 106, S.Ct. 1548, 91 L. Ed. 2d 265 (1986) in determining whether a movant has met this burden you must review the evidence and all factual inferences therein in the light most favorable to the party opposing the judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L.Ed. 2d 152

(1970) as this court said:

> "All reasonable doubts about the facts are resolved in favor of the non-movant, K.D. Enterprises, v. AM Hardware Mutual Ins. Co., 655 f.2d 598, 602 (5th Cir. 1981). If reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny judgment. Impossible Electronics Techniques, Inc. v. Wackenhut Protective System, Inc. 669 F.2d 1027, 1031 (5th Cir. Unit B 1982)...Mercantile Bank and Trust Co., v. Fidelity & Deposit Co., 750 F.2d 838, 841, ·11th Cir. 1985)."

Moreover, this Court has said:

"Ordinarily...Judgment should not be granted in cases where motive, intent, subjective feeling, and reactions are to be searched..."

Rogers v. Evans, 792 F.2d 1052, 1059 [11th Cir. 1986].

Here the case before this High Bench Petitioner, James E. Hawthorne, declares this complaint "Employment Discrimination" pursuant to Title VII of the Civil Rights Act of 1964 [42 U.S.C. - 2000e seq.] is with merit, and that his constitutional rights have been violated and that the Summary Judgment in a Civil case, (this case) 95-30274-RV

dated October 22, 1996 should not have been granted.

The judgment entered by the District Court is truly in conflict with the 11th Cir. Court, and the cases cited above. That as far back as July 28, 1868, pursuant to the fifth Article of the Constitution, The Fourteenth Amendment was ratified. Then and now the Fourteenth Amendment to the Federal Constitution operates to prevent arbitrary and oppressive State action that adversely affect Liberty rights of any person. Consistent with requirements of due process comes these fundamental principles set forth:

Section 1, Due Process of Law...nor shall any state deprive any person of...Liberty...without due process of law...U.S.C.A. Const. Amend. 14-1 P.168. Petitioner in reviewing the state's action under a claim of rights guaranteed by Due Process clause of this amendment (Equal Protection)...Federal Courts may not draw on merely personal and private notions and disregard the limits that bind judges in

their judicial function, and even though the concept of Due Process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of Judicial Process; and these are considerations deeply rooted in reason and in compelling tradition of the legal profession. As cited in Rochin v. People of Cal. [1952] 72 S.Ct. 205, 242 U.S. 165, 96 L. Ed 183, 25 A.L.R. 2d 1396; thus; U.S.C.A. Const. Amend. 13-14, P. 925 B, 1255e, ...Judicial review of the guarantee of...impose on Federal Court...an exercise of judgment upon the whole course of proceeding...Hawthorne v. University of West Florida, etal....to ascertain whether Respondents offered those canons of decency and fairness which express the notions of Justice of English speaking peoples.

The Petitioner claims a denial of rights guarantee under the Federal Constitution, and that his case may be determined under Federal Constitutional Law. That courts power to resolve this conflict is expressly given by the Constitution in Article 1,

Section 8, Clause 18.

Applying the standards and cases cited, you must reverse the District Court's Summary Judgment in favor of the non-Movant, and grant the relief requested in the Title VII complaint, and the motion under F.R.C.P. Rule 60 to vacate summary judgment.

STATEMENT OF CASE

Petitioner James E. Hawthorne was discharged from his employment after eleven years at the University of West Florida. During his first 10 years he had never received any suspensions. In 1991, he inquired into and about discrimination among employees as well as himself. After this, he started being retaliated against. He was suspended three times in one month, after working for ten years without any suspensions. The attorney of the Respondent took a deposition of the Petitioner's supervisor Rachel Booker where she stated that once the Petitioner started going to Personnel and looking into employees' personnel files concerning their education, the Director of the Physical Plant, Dan Simpler had her and supervisor Don Williams retaliate against the Petitioner. Ms. Booker also stated that she went home crying for what she was forced to do to Petitioner and "all I did was what she was told to do...because of my job - my jeopardy."

On March 13, 1992, he was terminated from his

job. The reason given for his termination from the Personnel Director, Ms. Rosalind Fisher, was that he was in violation of the University's policy of unauthorized use of state property (by using the telephone).

A complaint was filed with the EEOC in Miami, Florida (see copy in Court records). On May 23, 1995, the Petitioner received from the EEOC Division a letter giving him the right to address his case in the Federal Court and giving the Petitioner 30 days from the date of the letter.

That on June 19, 1995, the Appellant filed his complaint under Employment Discrimination, under Title VII, of Civil Rights Act of 1964 [42 U.S.C. - 2000e, et seq.].

On October 22, 1996, the District Court granted Summary Judgment to the the Respondents stating that there are "no genuine issues of material facts."

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admission on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. St. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). See Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

However, summary judgment is improper "if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." Cornelius v. Highland Lake, 880 f.2d 348, 351 (11th Cir. 1989), cert. denied, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it

might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

Conclusively, allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." Carter v. Miami, 870 F.2d 578, 585 (11th Cir. 1989); Ramsey v. Leath, 706 f.2d 1166, 1170 (11th Cir. 1983). Here, in this case, there are no conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay. The Petitioner has submitted sufficient evidence on record in both the District Court and the Appeals Court to substantiate that there is genuine issue of

material facts. On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine.

Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the nonmoving party. McCabe v. Sharett, 12 F.3d 155d, 1560 (11th Cir. 1994).

Based on the volume of record evidence and cited case law, the District Court erred in granted summary judgment to the Respondents.

1. Is the Court in error granting Summary Judgment when a Rule 60 Motion under the Rules of Civil Procedure is filed; when neglect, newly discovered evidence, and fraud come into play after summary judgment was entered?

That on February 24, 1997, the Petitioner filed

in the United States District, Northern District, Pensacola Division, motion under Fed. R. Civ. P. Rule 60, Motion Under Fed. Rules of Civ. Pro. (See Appendix I. A copy of the motion was forwarded to the Appeals Court along with a motion to stay the appeal until a ruling was made by the District Court on March 1, 1997.

On March 13, 1997, the District Court denied the motion under Fed. Rules Civil P., Rule 60 by the Honorable Roger Vinson, U.S. District Judge. The Petitioner notified the Appeals Court by telephone and followed with a copy of the order denying the Rule 60 Motion to the Court of Appeals Atlanta, GA.

The Petitioner filed a motion under the Federal Rules of Civ. Pro. 60(b)(1) seeking to vacate the summary judgment based on alleged neglect, ineffective assistance of counsel and fraud, based on his attorney's negligence and therefore relief under Rule 60 states that a court may relieve a party from

final judgment for the following reasons: "mistake, inadvertence, surprise or excusable neglect". Fed. R. Civ. Pro 60 (b)(1)(1996). The Supreme Court uses "a flexible analysis" when determining if an action falls within the definition of "excusable neglect." Advanced Estimating System, Inc. v. Riney, 77 f.3d 1322, 1324 (11th Cir. 1996) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed. 2d (1993). In Pioneer, the Court stated "Congress plainly contemplated that the courts would be permitted, [when] appropriate to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id.

In this current action, it was a complete surprise when the Petitioner found out that his retained attorney had failed to file motions on a timely manner with the District Court, and later upon an inquiry to the Florida Bar found out that

his attorney of record had been admonished by the Florida Bar and still had cases pending based on the same neglect, non-representation, and ineffective assistance of counsel, that she showed toward this Petitioner.

It would be unlikely that any Court in the United States would not have ruled in favor of Rule 60 (b)(1) where there has been a tremendous showing of unexcusable negligence shown on the part of a licensed certified attorney to practice law in the State of Florida, or in fact, in any state within the United States. Based on the Federal Rules of Civil Procedure, Rule 60 the words described in Rule 60 "mistake, inadvertence, surprise or excusable neglect", has a true meaning when related to this action of the Petitioner's case. And therefore, the District Court did in fact err in not granting the Petitioner's motion to vacate summary judgment under Rule 60 (b)(1).

Therefore the writ of certiorari should be granted to

vacate summary judgment and allow the Petitioner his rightful day in Court.

2. Does the rules, law and statutes of Ineffective Assistance of Counsel apply to a paid attorney, as well as one appointed by the courts - both state and federal?

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel in all criminal prosecutions. The Supreme Court in Strickland v. Washingt n, 466 U.S. 668, 104 S. Ct. 2052 (1984), established a two prong test to evaluated ineffective assistance claiming: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceedings. The Court has held that the second prong in Strickland requires more than a showing that the outcome of the proceeding would have been different but for counsel's error.

If, taking the same two prong test as in Strickland and apply it to this case at bar, James Hawthorne v. University of West Florida, and that the AttorneyStewart admits before the Supreme Court of Florida that she has violated the rules, (See Appendix: H,) Page 4 of 23, 5 of 23, 6 of 23, 7 of 23, and 8 of 23 shows that both of the two prong test in Strickland would apply in this case under Ineffective Assistance of Counsel. That the Rule 60 (b)(1)(2) and (3) make the second question presented, void the Summary Judgment. (See Appendix J).

REASONS FOR GRANTING THE PETITION

In this instant proceeding at bar many irregularities interplayed that became harmful to this Petitioner as he sought to have his case aired and heard in both the United States District Court, Northern District of Florida, Pensacola Division, and the Eleventh Circuit Court of Appeals. A number of these irregularities consisted of violations of procedural and substantive law; others were violative of the constitutional process itself, as when the customary rules of the game are shielded and obscured from the Petitioner, the whole concept of legal jurisprudence is no less than tainted with impropriety that the entire judicial system would thusly lose its "raison d'etre."

The Petitioner in this cause is a Pro-Se litigant, who is unschooled and untrained in the erudite and quite often machination of law. It is complex, too technical and issue-oriented, and too delicate and/or involved for the Petitioner to go

this route alone. This Petitioner has sought for help in this and other areas while trying to get his day in court. He has been systematically denied, and has cried out aloud for help; but has been left to wallow in his own tears.

Now this Petitioner, James E. Hawthorne, Pro-Se, comes to this High Bench to have this Illustrious Body to peer down at him and hopefully to register the desired compassion and understanding for his earnest and truly sincere plea. To this end the Petitioner makes this call to the high bench to grant this Petition for Writ of Certiorari.

CONCLUSION

For the reasons discussed and the facts of law, the Petitioner strongly feels that he has been dealt a great injustice on the part of the judicial system in both the United States District Court, and in the United States Court of Appeals for the Eleventh Circuit.

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

That no opinion was written on the case that went before the Eleventh Court of Appeals.

Petitioner feels that both Courts went against case law that has been set and ruled on by this High Bench.

That questions presented in the Petitioner's Writ of Certiorari have great impact on the Constitutional Laws and the Rules of Civil Procedure that govern the Federal Court Systems.

WHEREFORE, the Petitioner prays that this Honorable High Court will grant the Writ of

Certiorari, that Petitioner will be assured that he will have his day in Court and restores his faith in our Justice System.

James Hawthorne
Pro-Se Counsel
P.O. Box Box 9556
Pensacola, FL 32513

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the forgoing instrument and documents were sent via U.S. Mail to Barbara Auger, Esq., Florida Bar No. 0946400, P.O. Box 10095, Tallahassee, FL 32302-2095, (904) 222-3533, this 13 day of August, 1998

James Hawthorne
Pro-Se Counsel

Appendix A - Summary Judgment is Granted

JUDGMENT IN A CIVIL CASE

United States District Court *Northern District of Florida*

Case Title:	*Docket Number*
JAMES HAWTHORNE	*95-3027/RV*
v.	*Name of Judge or Magistrate Judge* *HONORABLE ROGER VINSON*

THE BOARD OF REGENTS OF THE STATE UNIVERSITY SYSTEM d/b/a THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, individually, EARL SMITH, individually, DAN SIMPLE, individually, and RACHAEL BOOKER, individually.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) name above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion for summary judgment is GRANTED for all defendants and against the plaintiff, JAMES HAWTHORNE, together with taxable costs.

ROBERT A. MOSSING, CLERK October 22, 1996
by Deputy Clerk: C. Justice
ENTERED ON DOCKET October 22, 1996 by cbj
Copies mailed to: Stewart, Culpepper, Auger, COB 1996

Appendix B - Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES HAWTHORNE,
Plaintiff

CASE NO. 9530274/RV

v.

UNIVERSITY OF WEST FLORIDA, Et.al.
Defendants

Notice of Appeal

Notice is hereby given that the Plaintiff to the action, James Hawthorne, hereby appeals to the United States Court of Appeals for the Eleventh Circuit, Atlanta, Georgia, from the Granting of Summary Judgment to the Defendants in this Action, University of West Florida, et.al. which was entered on the 22nd day of October, 1996.

_____

JAMES HAWTHORNE, PRO.SE.

(904)433-5520
412 East Strong Street
Pensacola, Florida 32501

Appendix C - Affirmed: Decision of Appeal Court

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3664
Non-Argument Calendar

D.C. Docket No. 95-CV-30274,RV

JAMS HAWTHORNE

Plaintiff-Appellant

versus

THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, EARL SMITH, DAN SIMPLE, and RACHAEL BOOKER,,

Defendants-Appellees

THE FLORIDA DEPARTMENT OF INSURANCE,Division of Risk Management

Defendant

Appeal from the United States District Court
for the Northern District of Florida

(October 31, 1997)

Before TJOFLAT, COX and CARNES, Circuit Judges.

PER CURIAM:

Appendix C

James E. Hawthorne appeals the district court's order granting the defendant's motion for summary judgment in Hawthorne's employment discrimination action. Having reviewed the briefs and the pertinent part of the record on appeal, we conclude that the district court properly entered summary judgment against Hawthorne.

AFFIRMED.

• All of appellant's outstanding motions are DENIED. Appellee's motion to strike appellant's brief is GRANTED as to Issues 2 and 3 of that brief. Appellee's motion to strike supplemental correspondence is DENIED as moot.

Appendix D - Petitions for Rehearing are Denied

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 96-3664

JAMS HAWTHORNE

Plaintiff-Appellant

versus

THE UNIVERSITY OF WEST FLORIDA BOARD OF REGENTS, JOHN MARTIN, EARL SMITH, DAN SIMPLE, and RACHAEL BOOKER,

Defendants-Appellees

THE FLORIDA DEPARTMENT OF INSURANCE,Division of Risk Management

Defendant

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC
(Opinion) _____
_____, 11th Cir., 19 ____,
_____F.2d____).
Before: TJOFLAT, COX and CARNES, Circuit Judges.
PER CURIAM
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestions(s) of rehearing En Bank are DENIED

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

Appendix E - 1st Extension of Time is Granted

In the Supreme Court
of the United States

James E. Hawthorne, Pro-Se

Petitioner

vs.

Application No.: A-736

University of West Florida, et.al.

Respondents

Request for an Extension of Time To File

Petition for Writ of Certiorari

COMES NOW, the Petitioner, James E. Hawthorne, Pro Se, requesting this Honorable and Illustrious High Court to grant this motion for a second extension of time to file his petition for Writ of Certiorari, and states the following in support of his request.

The Petitioner in this cause of action begs the indulgence and patience of this Honorable Court to allow this request under the liberal leave and license of Haines v. Kerner, 404 U.S. 519, 92 S. Ct., 594 (1992), and also Hughes v. Rose, 449 U.S. 101 S. CT., 173 (1980) 3 PLM 91 (April 1981):

> ...However, a pro-se complaint
> is held to less stringent
> standards than formal pleadings

Appendix E

drafted by lawyers, and should not be dismissed unless claims clearly do not state a legal violation or are not supported by factual allegations.

The Petitioner is requesting that he be granted a second thirty (30) day extension of time to file his petition for Writ of Certiorari because of **misrepresentation** by his attorney. On April 23, 1998, the Petitioner was scheduled for a final hearing with the Florida Bar concerning his case against his former attorney, Sadie Moore Stewart. The Petitioner received a phone call around April 17, 1998, from the Florida Bar notifying him that the hearing had been canceled because Ms. Stewart and the Florida Bar had agreed on a settlement in which Ms. Stewart has pleaded guilty (see attached). The Florida Bar also told the Petitioner that they had recommended to Judge Wright that Ms. Stewart receive a suspended sentence of 91 days and be fined. As of today, Ms. Stewart's license has been suspended **indefinitely**. Ms. Stewart has been found guilty of misrepresenting approximately six other clients.

This lawyer has caused great harm to the Petitioner's case and this is the Petitioner's main argument in his Writ of Certiorari to this High and Esteemable Court and for his request for an extension of time. He is requesting the extension of time to give him more time to seek legal help so he can file this Writ of Certiorari because his previous lawyer was found guilty of misrepresentation

and her license has been suspended indefinitely.

THEREFORE, based on the support herein, the petitioner prays that the Honorable Court will grant this request for a second extension of time of thirty (30) days. So that the ends of justice can be best served.

Certificate of Service

I hereby certify that on April _____, 1998, a true and correct copy of the foregoing brief has been furnished by United States certified mail to Barbara Auger Florida Bar No. 0946400, Pennington, Moore, Wilkinson & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302-2095.

James E. Hawthorne
Pro-Se
P.O. Box 9556
Pensacola, Fla. 32513
(850) 433-5520

Appendix E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Mr. James E. Hawthorne
P.O. Box 9556
Pensacola, FL 32513

March 31, 1998

RE: James Hawthorne
v. University of West Florida, et.al.
Application No. A-736

Dear Mr. Hawthorne:

The application for an extension of time within which to file a peititon for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy who on March 31, 1998, extended the time to and including April 30, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,Clerk
By
Ruth Jones, Assistant

NOTIFICATION LIST:
Mr. James Hawthorne
P.O. Box 9556
Pensacola, FL 32513
Ms. Barbara Auger
P.O. Box 10095
Tallahassee, FL 32302-2095
Clerk, United States Court of appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Appendix F - 2nd Extension of Time is Granted

In the Supreme Court
of the United States

James E. Hawthorne, Pro-Se

Petitioner

vs.

Application No.: A-736

University of West Florida, et.al.

Respondents

Request for an Extension of Time
To File Petition for Writ of Certiorari

COMES NOW, the Petitioner, James E. Hawthorne, Pro Se, requesting this Honorable and Illustrious High Court to grant this motion for a **third and final extension of time** to file his petition for Writ of Certiorari, and states the following in support of his request.

The Petitioner in this cause of action begs the indulgence and patience of this Honorable Court to allow this request under the liberal leave and license of Haines v. Kerner, 404 U.S. 519, 92 S. Ct., 594 (1992), and also Hughes v. Rose, 449 U.S. 101 S. CT., 173 (1980) 3 PLM 91 (April 1981):

> ...However, a pro-se complaint is held to less stringent standards than formal pleadings drafted by lawyers, and should not be dismissed unless claims

clearly do not state a legal violation or are not supported by factual allegations.

The Petitioner is requesting that he be granted a **third and final forty five (45) day extension of time** to file his petition for Writ of Certiorari because of **misrepresentation** by his attorney. The Petitioner argued in the **District Court** that he had **misrepresentation**; again the Petitioner argued in the **Appeal Court** that he had **misrepresentation**; the Petitioner argued again in his **Initial Brief**, on pages 1, 2, and 3, that he had **misrepresentation**; the Petitioner also argued in his **reply brief** that he had **misrepresentation** on pages 7, 8, and 9; and the Petitioner argued that he had **misrepresentation** in his **EnBanc Consideration**. Under Rule 60. (b) Relief from Judgment or Order (see attached), the Petitioner's case should be sent back to the District Court for trial if the following things occur:

Misrepresentation: mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.

Now the truth has come out, the Petitioner's former attorney, Sadie Moore Stewart has pleaded *guilty* on April 15, 1998 in the Supreme Court of Florida that she has misrepresented the Petitioner. See attached. (She also pleaded guilty to misrepresenting three other clients besides the Petitioner. At the time the Petitioner hired this attorney her license was under suspension by the Florida Bar.)

THEREFORE, based on the support herein, the

petitioner prays that the Honorable Court will grant this request for a **third and final** extension of time of forty five (45) days. So that the ends of justice can be best served.

Certificate of Service

I hereby certify that on May _____, 1998, a true and correct copy of the foregoing brief has been furnished by United States certified mail to Barbara Auger Florida Bar No. 0946400, Pennington, Moore, Wilkinson & Dunbar, P.A., Post Office Box 10095, Tallahassee, Florida 32302-2095 and to Judges Tjoflat, Cox, and Carnes, Circuit Judges at the U.S. Appeal Court, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

James E. Hawthorne
Pro-Se
P.O. Box 9556
Pensacola, Fla. 32513
(850) 433-5520

Appendix F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Mr. James E. Hawthorne
P.O. Box 9556
Pensacola, FL 32513

April 28, 1998

RE: James Hawthorne
v. University of West Florida, et.al.
Application No. A-736

Dear Mr. Hawthorne:

The application for an extension of time within which to file a peititon for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy who on April 28, 1998, extended the time to and including May 29, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,Clerk
By
Ruth Jones, Assistant

NOTIFICATION LIST:
Mr. James Hawthorne
P.O. Box 9556
Pensacola, FL 32513
Ms. Barbara Auger
P.O. Box 10095
Tallahassee, FL 32302-2095
Clerk, United States Court of appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Appendix G - *Attorney Suspended from Practice of Law, by the Supreme Court of Florida*

SUPREME COURT OF FLORIDA

WESNESDAY, DECEMBER 24, 1997

THE FLORIDA BAR,
Petitioner,
v.
SADIE MOORE STEWART, CASE NO. 91,803
Respondent

* *

The Florida Bar having filed its Notice of Noncompliance with a Subpoena on November 12, 1997, and respondent having failed to file a response,

IT IS ORDEREDED that respondent is suspended from the practice of law unti such time as all subpoenaed trust records are produced and omplete compliance has occurred. Respondent's suspension is effective thirty (30) days from the filing of this order so that resondent can close out her practice and protect the interests of existing clients.

KOGAN, C.J., OVERTON, SHAW, HARDING, WELLS AND ANSTEAD, JJ., and GRIMES, Senior Justice concur

KB

cc: Ms. Lois B. Lepp
Mr. John A. Boggs
Ms. Sadie Moore Stewart

Appendix H -Conditional Guilty Plea from Attorney to the Supreme Court of Florida on April 15, 1998 of Misrepresentation of the Petitioner

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Case Nos. 91,263 and 91,338 and 91,940

vs.

TBS File Nos. 97-00765-01B
97-00617-01B
97-00727-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No92,515

vs.

TBS File No. 97-00190-01B
97-00505-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No.91,803

vs.

TBS File No. 98-00123-01B

SADIE MOORE STEWART,
Respondent,

THE FLORIDA BAR,
Complainant,

Case No.

vs.

TBS File Nos. 97-0001312-01B

SADIE MOORE STEWART,
Respondent,

Appendix H

THE FLORIDA BAR,
Complainant,

Case No.

vs.

TBS File Nos. 98-00713-01B

SADIE MOORE STEWART,
Respondent,

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

Respondent, SADIE MOORE STEWART, files this conditional Guilty Plea of Consent Judgment to Rule 3-8.9, Rules of Discipline of the Florida Bar and says:

1. Respondent is, and at all times was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Case Nos. 91,623, 91,338 and 91, 840 (The Florida Bar File Nos. 97-00765-01B, 97-00617-01B, and 97-00727-01B, respectively) have been consolidated before the Referee by order dated February 13, 1998. By agreement as outlined herein, Case No. 92,515 (The Florida Bar File Nos. 97-00190-01B and 97-00505-01B) is consolidted before the Referee with Case Nos. 91,623, 91,338 and 91, 840. With respect to The Florida Bar File Nos. 97-01312-01B and 98-9713-01B, as outlined herein, Respondent has waived probably cause and theifling of a formal complaint and has agreed to consolidation of these matters with Case Nos. 91,263, 91,338 and 91,840.

Case No. 91,803 (The Florida Bar File No. 98-00123-01B) is presently pending before the Supreme Court of florida and has not been assigned to the Referee for anyf urther proceedings. The parties will file a separate pleading with the Surpeme Court of Florida as a result of the agreement made herein.

Appendix H

Case No. 91,263 (TFB No. 97-00765-01B)
Complaint of The Florida Bar

3. Respondent admits that she has violated the following rules:

Rule 1-3.4(a) (any member who is suspended by reason of failure to complete continuing legal education requirements shall be deemed a delinquent member. A delinquent member shall not engage in the practice of law in this state and shall not be entitled to any privileges and benefits accorded to members of The Florida Bar in good standing. Any member suspended for failure to complete continuing legal education requirements may be reinstated as elsewhere provided in these rules) of the Rules of Professional Conduct, by the following acts:

Respondent was required to complete 30 hours, including two hours of Ethics, of Continuing Legal, Education prior to July 31, 1996. On or about August 16, 1996, The Florida Bar, via certified mail, advised Respondent that she was ineligible to practice law because of her failure to comply with her Continuing Legal Education Requirements (CLER). Due to Respondent's direction to her office staff, Respondent did not pick up the certified letter from The Florida Bar until September 19, 1996.

On or about September 26, 1996, Respondent filed a motion for extension of time in Michael Clark v. Robert E. Rubin, Secretary of the Treasury, the Department of Treasury and the U.S. Customs Service, Case No. 5:96CV3361RH, in the United States District Court, Northern District of Florida, Panama City Division, citing therein her health as the reason for the motion. At no time did Respondent advise the United States District Court that she was ineligible to practice law due to her failure to comply with CLER.

On or about October 1, 1996, Respondent petitioned

The Florida Bar for removal of CLER delinquency. In so petitioning, Respondent was required to fill out a form petition for removal of CLER delinquency. Respondent answered under oath all questions on the form petition except the following:

5. "During my delinquency, I have / I have not (circle one) practiced law in Florida or rendered advice on matters of Florida law."

Respondent was reinstated to membership in good standing, on or about October 3, 1996. Respondent continued her practice of law during the period that she was ineligible to practice law in Florida and despite her knowledge that she was ineligible to do so.

Case No. 91,338 TFB No. 97-00727-01B
(Complaint of James Hawthorne)

4. Respondent admits that she has violated the following Rules:

Rules 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client.), 4-1.4(b) (Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation), 4-3.2 (A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.), and 4-1.5(f) (Contingent Fees. As to contingent fees: (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a continent fee matter, the lawyer shall

provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination; (2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts; (4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortuous conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements: (A) The contract shall contain the following provisions: (i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)." (ii) "This contract may be canceled by written notification to the attorney at any time within 'i business days of the date

the contract was signed, as shown below, and if canceled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client; (C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5) of the Rules of Professional Conduct, by the following acts:

James E. Hawthorne filed suit in the United States District Court, Northern District of Florida, Pensacola Division, alleging racial discrimination and retaliatory conduct by the University of West Florida. After the University of West Florida filed a motion to dismiss, Mr. Hawthorne hired Respondent to represent him in this lawsuit.

On or about August 23, 1995, Respondent filed a notice of appearance in the case. Pursuant to an agreement of counsel and a pretrial order, certain disclosures as required by Rule 26 (A) of the Federal Rules of Civil Procedure (regarding witness lists, inte alia) were due to be filed on December 20, 1995. On or about December 22, 1995, the University of West Florida filed its Rule 26 (A) disclosure. On or about February 23, 1996, the University of West Florida filed a motion to compel the filing of the plaintiffs Rule 26 (A) disclosure. By order dated March 7, 1996, the court granted the University of West Florida's motion to compel and ordered that plaintiff s Rule 26 (A) disclosure

should be filed by March 14, 1996. The court also awarded attorneys fees in the amount of $68 to the University of West Florida which fees were to paid within IO days of the court's order.

Respondent filed the plaintiffs Rule 26 (A) disclosure on March 14, 1996. The University of West Florida filed a motion for summary judgment in April 1996, to which Respondent responded. By order dated October 22, 1996 the court granted summary judgment unto the University of West Florida. Respondent forwarded a copy of the order granting summary judgment to Mr. Hawthorne.Respondent did not clearly advise Mr. Hawthorne that he had 30 days from October 22, 1996 within which to file a notice of appeal of the order granting, summary judgment. On Wednesday, November 20, 1996, Mr. Hawthorne contacted Respondent to inquire as to whether she was going to file an appeal of the order granting summary judgment. Respondent appeared to be unaware that the time for filing the appeal ran on November 21, 1996. Apparently Mr. Hawthorne was under the impression that the time to appeal ran on November 22, 1996; nonetheless, on November 21, 1996, he filed a notice of appeal pro se. Respondent did not clearly establish with her client the issue of whether Mr. Hawthorne wanted to appeal the summary judgment and whether Respondent would file that notice of appeal for Mr. Hawthorne.

Respondent agreed to accept the representation of Mr. Hawthorne for a $500 retainer plus a fee contingent upon the outcome of the case. Respondent did not enter into a written contingency fee contract with Mr. Hawthorne nor did she provide Mr. Hawthorne with a copy of the statement 7 of 23 of clients rights.

Case No. 91,840, TFB No. 97-00617-OIB
(Complaint of Gillis Thomas)

5. Respondent admits that she has violated the following Rules:

Rules 4-1.6(a) (Confidentiality of information (a)

Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client) and 4-3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) of the Rules of Professional Conduct, by the following acts:

In approximately November 1996, Respondent was hired to represent Gillis Thomas in a employment discrimination matter a against J.C. Penney, Inc. A hearing-was scheduled before the
Honorable Lacy Collier, U.S. District Court, Northern District of Florida, Pensacola Division, for June 14, 1996 at 10:00 a.m. Respondent failed to appear at the hearing before Judge Collier. Respondent did attempt to make a telephone appearance before Judge Collier in this matter, but such appearance was denied. As a result of the June 14, 1996 hearing, certain costs were assessed against Mr. Thomas, the plaintiffs

After Mr. Thomas filed a complaint with The Florida Bar on January 17, 1997, Respondent wrote Mr. Thomas and advised that she was terminating the representation and cited therein certain attorney/client privilege, and therefore confidential, information relative to Mr. Thomas' case against J.C. Penney. Respondent provided J.C. Penney's counsel with a copy of her attorney/client privileged communication with Mr. Thomas which disclosed information detrimental to Mr. Thomas' action against J.C. Penney.

Case No. 92,515 (TFB Nos. 97-00190-01B and 97-00505-OIB)

(Complaints of Sammy Barnes, Ray,v Dunklin, and James Cox and Gary Scott)

6. Respondent admits that she has violated the following Rules:

Rules 4-1.4(h) (Duty to Explain Matters to Client. A

lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); 4-1.15(a) (Clients' and Third Party Funds to be Held in Trust. A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer comingle the clients funds with those of the lawyer or those of the lawyers law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation.); and 4-1.15(b) (Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a fall accounting regarding such property.) of the Rules of Professional Conduct and 5-1.1(a) (Nature of Money or Property Entrusted to Attorney. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and

other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collection. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy.); 5-1.1(b) (Trust Accounts Required. Any bank or savings and loan association account maintained by a member of The Florida Bar to comply with rule 4-1.15, Rules of Professional Conduct, is and shall be clearly labeled and designated as a trust account. Any safe deposit box used in connection with the practice of law in Florida maintained by a member of The Florida Bar to comply with rule 4-1.15 shall be located in this state unless the client otherwise
consents in writing. A member of The Florida Bar shall advise any' institution in which such deposit box is located that it may include property of clients.); 5-1 .1 (c) (Trust Accounts as Official Records. A member of The Florida Bar shall preserve or cause to be preserved the records of all bank and savings and loan association accounts or other records pertaining to the funds(is or property of a client or a third party maintained in compliance with rule 4-1.15 for a period of not less than 6 years subsequent to

the. final conclusion of the representation of a client relative to such funds or property. Such records shall include checkbooks, canceled checks, check stubs, vouchers, ledgers and journals, closing statements, accountings or other statements of disbursements rendered to clients or third parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source, and reason for all receipts, withdrawals, deliveries, and disbursements of the funds or property of a client or third party. Such records shall be kept pursuant to these rules as a specific prerequisite to the right to receive, deliver, and disburse funds or property of a client or third party and to have a public aspect relating to the protection of clients and to fitness of a member of The Florida Bar to practice law. In any instance of an alleged violation by a member of The Florida Bar of this rule or of any of the Rules of Professional Conduct, such records insofar as they may relate in any way to the transaction, occurrence, or client in question shall be produced by the members of The Florida Bar for inspection, audit, and copying by a designated representative of The Florida Bar upon the direction of this court, a grievance committee, the board of governors if acting pursuant to rule 3-7.5(b), or a referee. Such records or copies thereof shall be admissible in evidence in any proceeding under this rule; provided notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and upon good cause shown by such client the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the respondent and may include but are not limited to excision, in camera production, retention in seated envelopes, or similar devices. Failure to maintain such records or to produce them upon such direction shall constitute ground for

disciplinary action under this rule without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against a respondent.); 5-1.1 (d) (Trust Accounting. Minimum trust accounting records shall be maintained and minimum trust accounting procedures must be followed by all attorneys practicing in Florida who receive or disburse trust money or property.); 5-1.1(e)(2) (Interest on Trust Accounts (IOTA) Program. Required Participation. All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing from an office or other business location within the state of Florida shall be deposited into one or more interest-bearing trust checking accounts in an eligible financial institution for the benefit of the Foundation, except as provided in rule 4-1.15 with respect to funds maintained other than in a bank account, or as provided in rule 5-1.2(a). Only trust funds that are nominal or short term shall be deposited 'into an IOTA account. The member shall certify annually, in writing, that the member is in compliance with, or is exempt from, the provisions of this rule.); 5-1.2(b) (Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained: (1) A separate bank account or accounts and, if utilized, a separate savings and loan association account or accounts. Such accounts shall be located in the state of Florida unless the client otherwise directs, in writing, or unless the financial institution in which the funds are maintained voluntarily submits to the jurisdiction of the Supreme Court of Florida. Such voluntary submission to the j jurisdiction of the Supreme Court of Florida shall be on the form prescribed by the board of -governors of The Florida Bar. The account or accounts shall be in the name of the lawyer or law firm and clearly labeled and designated as a "trust account." (2) Original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying,: (A) the date and source of all trust funds

received; and (B) the client or matter for which the funds were received. (3) Original canceled checks, all of which must be numbered consecutively, or, if the financial institution wherein the trust account is maintained does not return the original checks, copies thereof, as provided by the financial institution. (4) Other documentary support for all disbursements and transfers from the trust account. (5) A separate cash receipts and disbursements 'journal, including columns for receipts, disbursements, transfers, and the account balance and containing at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed,. or transferred. (6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred. (7) All bank or savings and loan association statements for all trust accounts.); and 5-1.2(c) (Minimum Trust Accounting-Procedures. The minimum trust accounting procedures that shall be followed by all attorneys
practicing in Florida who receive or disburse trust money or property are as follows: (1) The lawyer shall cause to be made monthly: (A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and (B) a comparison between the

total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefore. (2) At least annually, the lawyer shall prepare a detailed listing identifying the balance of the unexpended trust money held for each client or matter. (3) The above reconciliations, comparisons, and listing shall be retained for at least 6 years. (4) The lawyer or law firm shall authorize and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error. (5) The lawyer shall file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors.) of the Rules Regulating Trust Accounts of The Florida Bar, by the following acts:

Respondent was hired, as successor counsel, by nine people to represent them in a racial discrimination case arising out of their employment by the U.S. Navy, Coastal Systems Station, Panama City, Florida. The representation was intended to become a class action matter.

On or about November 27, 1995, Respondent entered into a modified contingency fee agreement, signed by three of the plaintiffs, Sammy Barnes, Ray Dunklin, and James Cox, in which
the Respondent was paid a$12,500 retainer. Costs of the litigation were to be paid by the clients.

At the time the clients hired Respondent, they inquired about Respondent's experience in handling United States Code Title VII discrimination cases and class action matters. Respondent advised her clients that she was experienced and could handle their legal matter. At no time did the Respondent advise the clients that her experience in United States Code Title VII actions had been limited to administrative actions before the Equal

Employment Opportunity Commission (EEOC). At no time prior to being hired did Respondent advise her clients that she had never before participated in a class action matter.

Beginning in the spring of 1996 and for approximately three months, Respondent was out of her office a significant amount of time because of a family member's illness. Respondent left her paralegal, Tamara Tikell, in charge of her law practice. Ms. Tikell, as Respondent's agent, requested $1,000 from the clients in April 1996 to be used to pay costs of the litigation. The clients delivered a $1,000 check to Respondent's office in April 1996. The clients repeatedly requested a receipt for the $1,000 from Respondent's office, to no avail. The clients requested an accounting, for the $1,000 which Respondent did not provide.

In response to the instant inquiry / complaint (TFB File No. 97-00505-OIB) on January 3, 1997, Respondent advised The Florida Bar that "the money in question was used to pay for transcripts of the Plaintiffs depositions and miscellaneous expenses." Respondent's response references a court reporter bill for $945.25. Because of the allegations regarding the $1,000 cost deposit, the First Judicial Circuit Grievance Committee "B" requested an audit of Respondent's trust account for the time period January 1, 1995 through May 31, 1997. The audit reveals, and Respondent confirms, that the $1,000 check for costs was not deposited into Respondent's trust account. The $1,000 was not applied towards the clients' costs of litigation. The $1,000 was deposited into Respondent's operating account. According to Respondent, Tamara Tikell removed the S 1,000 from Respondent's operating account immediately after it was deposited therein.

Respondent became aware of the discrepancy over the $1,000 costs in approximately May, 1996. Respondent states that sometime after October 1, 1996, using her own funds, she paid a court reporter $945.25, to cover the costs of depositions related to this matter. Respondent has not

accounted to the clients for the balance of $54.75.

The trust account audit, unable to be completed due to lack of records, revealed the following deficiencies:

A. Respondent did not maintain the following records:

-Original or duplicate deposit records, indicating (a) date and source of the deposit and (b) client and/or matter, for
the months of July 1995 through August 1996;

-Original canceled checks for July 1995 through August 1996;

-Original bank statements for July 1995 through August 1996;

-Cash receipts and disbursements journal;

-Client ledger accounts;

-Bank reconciliations;

-Monthly comparisons;

-Annual listing of trust obligations;

B. Respondent's trust account is not set up as an IOTA (Interest on Trust Accounts) account;

C. The checks do not reflect Ms.. Stewart's name, nor do the checks reflect that the account is a trust account.

D. A shortage of funds existed in the trust account.

TFB No. 97-01312-01B
(Complaint of Shirley Minter-Smith)

7. Respondent has waived a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 97-01312-0 1 B. Respondent consents to the consolidation of The Florida Bar File No. 97-01312-OIB with Supreme Court Case Nos. 91,263, 91,338 and 91,840 (TFB File Nos. 97-00765-OIB, 97-00617-OIB, and 97-00727-OIB, respectively, all of which have been consolidated before this Referee. Respondent hereby consents to the Referee having jurisdiction to consider and make recommendations to the Supreme Court of Florida as to this cause.

Appendix H

Respondent admits that she has violated Rule 4-1.4(a) (A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information) of the Rules of Professional Conduct, by the following actions:

On August 22, 1996, Respondent was retained by Ms. Shirley Minter-Smith to serve as attorney ad litem for her minor son's emancipation proceeding.

On or about September II, 1996, Ms. Minter-Smith's son was arrested for aggravated battery and robbery and Respondent was retained to handle his criminal case. Over the next 4-6 weeks, Ms. Minter-Smith was unable to communicate with Respondent to obtain information about the status of her son's criminal case.

On or about October 31, 1996, Ms. Minter-Smith retained another attorney to handle her son's criminal matter.

Respondent did not proceed with the emancipation proceeding while the criminal charges were pending. It appears that Ms. Minnter-Smith wanted to go forward with the emancipation proceeding, notwithstanding the criminal proceedings, yet the communication between Respondent and Ms. Minter-Smith on this issue is not clear.

TFB File No. 98-00713-01B
(Complaint of The Florida Bar)

8. Respondent has waived a formal finding of probable cause and the filing of a formal complaint with respect to TFB File No. 98-00713-01B. Respondent consents to the consolidation of The Florida Bar File No. 98-00713-01B with Supreme Court Case Nos. 91,26'), 91,338 and 91,840 (TFB File Nos. 97-00765-01 B, 97-00617-0 1 B, and 97-00727-0.1 B, respectively, all of which have been consolidated before this Referee. Respondent hereby consents to the Referee having jurisdiction to consider and make recommendations to the

Supreme Court of Florida as to this cause.

Respondent admits that she has violated Rules 4-3.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists) and 4-8.4(a.) (A lawyer shall not fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting, an investigation into the lawyer's conduct) of the Rules of Professional Conduct, by the following- acts:

Respondent represented the plaintiff Wanda Rogers in a federal action. The defendant, Marvin Runyon, the U.S. Postmaster, filed a motion for summary judgment At the hearing on the motion for summary judgment, Respondent appeared by telephone without leave of court while the defendants counsel was required to travel a significant distance to attend the hearing. Respondent conceded that summary judgment was appropriate. The defendant moved for a judgment of costs against Respondent based upon the above and Respondent did not respond, despite a requirement to do so under the court's rules. By order dated December 2, 1997, the United States District Court ordered Respondent to pay $2,260 to the defendant for her actions herein.

Respondent did not respond to The Florida Bar's requests for information about this matter.

Supreme Court Case No. 91,803
(TFB File No. 98-00123-01B)

9. In relation to the investigation of The Florida Bar File No. 97-00190-01 B, The First Judicial Circuit Grievance Committee "B" requested an audit of Respondent's trust account. Respondent was served with a subpoena for her trust account records, but Respondent did not comply with the trust account subpoena served on her on May 18, 1997, in that The Florida Bar only received partial records from Respondent. Respondent's non-compliance with the subpoena and non-response to the Supreme Court of Florida's order to show cause resulted in Respondent's

suspension from the practice of law effective January 26, 1998. Pursuant to the Court's order of December 24, 1997, Respondent is to remain suspended pending compliance with the subpoena and until further order of the Court. Respondent contends she has complied with the subpoena to the best of her ability. One of the matters included in this consent judgment in Case No. 92,515 (The Florida Bar File Nos. 97-00190-OIB and 97-00505-OIB) is Respondent's failure to maintain proper trust records. In light of the discipline to be imposed in this matter, including Case No. 92,515, The Florida Bar and Respondent agree to ask the Supreme Court of Florida to terminate the suspension in Case No. 91,803. The Florida Bar and Respondent will submit a separate pleading to the Supreme Court of Florida, alone, with a copy of this consent judgment, asking the Court to terminate the suspension in Case No. 91,803.

10. As an appropriate discipline for Respondent's misconduct, Respondent agrees to the imposition of a ninety-one (91) day suspension, which requires proof of rehabilitation, and to pay the costs of The Florida Bar.

11. The parties considered the following mitigating circumstances from the Florida Standards for Imposing Lawyer Sanctions, in reaching this agreement:

a. 9.32(b) Absence of dishonest or selfish motive;

b. 9.32(c) Personal or emotional problems: During 1996, Respondent was coping with the terminal illness and subsequent death of one of her sisters, for whom she was a caregiver. Further, Respondent was coping with the commission of a violent crime against her other sister. These events took Respondent out of her law office for a period of time and diverted her attention away from her law practice;

c. 9.32(f) Inexperience in the practice of law. Respondent was admitted to the practice of law on January 29, 1993 and most of the events occurred between late 1995 and 1997;

d. 9.32(e) Full and free disclosure to disciplinary

board or cooperative attitude towards proceedings. Respondent has cooperated with The Florida Bar in these proceedings and has been candid with The Florida Bar regarding her role and responsibility for these matters. Such cooperation and candor is a major consideration by The Florida Bar in entering into this consent judgment. Respondent contends that where she was non responsive, she had nothing to add to the proceedings;

e. 9.32(h) Physical or mental disability: Respondent suffers from Lupus which was diagnosed in 1997. During the time periods involved in these matters, Respondent was suffering from the symptoms of Lupus, which were undiagnosed. Respondent is currently being treated for Lupus.

f. 9.32(l) Remorse: Respondent's intent was to help these clients and she is remorseful that her actions or inactions resulted in harm to the clients and the public. Respondent recognizes that her major weakness stems from lack of office management skills and that she needs to associate herself with others who are better equipped at office management matters.

12. The parties considered the following aggravating circumstances from the Florida Standards for Imposing Lawyer Sanctions, in reaching this agreement:

a. 9.22(a) Prior disciplinary offenses: The Florida Bar File No. 96-00126-OIB (Complaint of Eugene M. Bernstein) - Respondent's neglect and lack of communication in an EEOC matter resulted in an admonishment before the grievance committee in 1996.

Supreme Court Case No. 90,013; The Florida Bar File No. 96-00958-OIB (Complaint of Jonathan McNabb) - Respondent's neglect and incompetent representation in a criminal matter resulted in a public reprimand in 1997.

Respondent is currently on an indefinite suspension for failure to comply with a trust account subpoena, as outlined in this consent judgment. Supreme Court Case No. 91,803; The Florida Bar File No. 98-00123-OIB.

b. 9.22(c) Pattern of misconduct; and

c. 9.22(d) Multiple offenses.

13. Respondent acknowledges that this Conditional Guilty Plea for Consent Judgment is tendered freely, voluntarily and without fear or threat of coercion.

14. Respondent acknowledges that she has been afforded all procedural and substantive due process guarantees regarding these disciplinary proceedings, and that for the purpose of tendering this Conditional Guilty Plea for Consent Judgment, Respondent hereby waives any objections relative to the denial of the same.

15. Respondent agrees to pay the costs incurred by The Florida Bar in bringing this action within 30 days of the Supreme Court of Florida's order which adopts any report of referee and this consent judgment, unless a waiver is granted by the Board of Governors.

16. If this plea is not approved by the Supreme Court of Florida, it is of no effect and neither the plea nor the statements contained herein can be used against Respondent in any way.

17. Should the Supreme Court of Florida approve this Conditional Guilty Plea for Consent Judgment, Respondent hereby agrees and acknowledges that same will not be the subject of future modification.

15 April, 1998

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Appendix I - Rule 60

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such misstakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect, Newly Disco-vered Evidence; Fraud, Etc. On motions and upon such terms as are just, the court m relieve a party or a party's,"s legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusesable neglect; (2) newly discovered evidence which which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon on which it is based has been reversed or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shalll be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not affect the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court.

Ineffective Assistance of Counsel.

What is it?

Overview: The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel in all criminal prosecutions. The Supreme Court in Strickland v-Washington. 466 U.S. MS, 104 S.CL 2052 (1984), established a two prong test to evaluate Ineffective assistance claim: (1) that counsels performance fall below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. The court has held that the second prong in Strickland requires more than a showing that the outcome of the proceeding would have been different but for counsel's error.

When deciding that a single error rendered counsel's performance ineffective,the Court must consider the totality of the circumstances when making its decision. Additionally, a court that finds that a defendant has failed to satisfy one prong of the Strickland test need not consider the other.

When considering the performance prong of Strinkland there is a "strong presumption" that counsel's strategy and tactics fall within the wide range of reasonable professional assistance. Courts have declined to characterize counsel's performance as ineffective assistance "when such counsel acted according to the defendant's restrictions on strategy, when the defendant failed to provide counsel with complete and accurate information, or when counsel refused to "assist the client in presenting false evidence or otherwise violating the law."

In evaluating the prejudice prong, the Supreme Court has identified a narrow category of cases in which prejudice is presumed. The presumption applies when there has been an "actual or constructive denial of the assistance of counsel altogether." or when there are various kinds of state interference with counsel's assistance" or when

counsel is burdened by an actual conflict of interest." The rationale for this per se rule is that, in these situations, prejudice is so likely to occur that a case-by-case inquiry is unnecessary.

II. Guilty Pleas, In the context of a guilty plea, a defendant can satisfy the prejudice prong by demonstrating that "but for counsel's deficient performance, a reasonable probability exists that the defendant would not have pleaded guilty and would have insisted on a trial."

III. Miscellaneous I.A.C. issues: Defend- Defendants have raised ineffectiveness claims concerning professional qualifications, performance before trial, actions regarding jury selection, performance during trial, actions concerning jury instructions, assistance during sentencing. and. performance on appeal.

Claims of Ineffective assistance of counsel are generally limited to collateral review and ordinarily will not be considered on direct appeal. Furthermore, defendants in state cases must exhaust state judicial remedies before a federal (U.S. District) Court will consider an ineffective assistance claim on habeas corpus review (28 USC 2254).

IV. Conflict of Interest Ineffective assistance of counsel may result from an attorney's conflict of interest In Cuvier v. Sullivan 446 U.S. 335. 100 S.Ct. 1708, 64 LEd.2d 333 (1980). the Supreme Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing: (1) that defense counsel was actively representing conflicting interests, and (2) that such conflict had an adverse effect on specific instances of counsel's performance.

When a defendant alleges that a guilty pleas resulted from defense counsel's conflict interest, the defendant must show a reasonable probability that he/she would have insisted on a trial but for the effect of the conflict of interest on counsel's advice.

A trial court has a limited duty to potential conflicts of interest. The court must initiate an inquiry if it knows or reasonably should know. that a potential conflict exists.

When the trial court has notice of a potential conflict but fails to make such an inquiry, the reviewing court will presume a violation of the Sixth Amendment right to counsel.

Conversely, when the trial court has no notice of a potential conflict of interest and the claim is raised for the first time on appeal, or in a habeas corpus proceeding, the defendant must satisfy the two prong Cuvier test.

In federal court, when defendants are represented by the same counsel, Rule 44(c). Federal Rules of Criminal Procedure, expressly requires such courts to conduct a prompt inquiry into potential conflicts of interest and advise each defendant of the right to separate representation.

This rule requires the court to take action to protect each defendant's right to effective assistance of counsel unless, after inquiry, the court has "good cause to believe no conflict of interest is likely to arise."

The right to conflict-free assistance of counsel may be waived by the defendant, if the waiver is knowing and intelligent.

The trial court must recognize a presumption in favor of the defendant's to waiver the right of conflict free representation and and retain counsel, but "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.

V. Intrusion into Client-Attorney Relationship. Once the defendant's right to counsel attaches, any government intrusion into the client-attorney relationship violates the Sixth Amendment if the defendant can show there is a realistic possibility that he/she was prejudiced by such intrusion.

In Weatherford v. Bursey, 429 U.S. 545. 97 & Ct 837. 51 LEd.2d 30 (1977). the Supreme Court outlined four factors to
the determination of whether the defendant suffered injury from any intrusion: (1) whether the government purposely

intruded into the client-attorney relationship, (2) whether any evidence offered
at trial was obtained directly or indirectly from the intrusion (3) whether the prosecutor obtained any details of the defendant's trial preparation or defense strategy, and (4) whether the overheard conversations had been used in in any other way to the substantial detriment of the defendant.

VI. In Evitts v. Lucey.469 U.& 387. 105 S.Ct. 830, 83 LEd.2d 821 (1985, the Supreme Court held that the Strickland standard also applies to appellate counsel. This standard applies to appeals as of a right only and not discretionary appeals since no right to counsel exists in a discretionary (collateral) appeal.

The Seventh Circuit U.S. Court of Appeals in Gray V. Green, 778 -F.2d 350 (7th Cir. 1985) held: (1) If appellate counsel has failed to raise a significant and obvious issue, failure could be viewed as deficient performance(s), and (2)'If (the) issue not raised may have resulted in a reversal of conviction, or an order for new trial, the failure was prejudicial."

Appellate counsel need not argue every issue, even if urged by Appellant. However, the issues raised "must not fall below 'an objective standard of reasonableness."'

In many cases, a counsel may not find, or be able to raise, arguable issues on appeal. Hence, he/she may file an Anders brief, see Anders v. California, 3W U.S. 738. 87 S.CL 1396. 18 LEd.2d 493 (1967), outlined by the Supreme Court to counsel from violating a professional duty owed to his/her client and the appellate court by not raising argument.

The general procedure established in Anders is to assure indigent defendants receive the same benefits afforded to those who are able to retain counsel on appeal.